

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRIAN KERRY O'KEEFE,
Petitioner,
v.

TIM GARRETT, *et al.*,
Respondents.

Case No. 3:22-cv-00327-LRH-CLB

ORDER DISMISSING ACTION

This habeas corpus action was initiated on July 21, 2022, by Brian Kerry O'Keefe, an individual incarcerated at Nevada's Lovelock Correctional Center. O'Keefe paid the filing fee on August 3, 2022 (ECF No. 7), so the Court will order the petition filed. On August 8, 2022, O'Keefe filed a motion (ECF No. 8) requesting that the Court take judicial notice of his payment of the filing fee. It is not necessary that the Court take judicial notice of the payment, however, and O'Keefe's motion for the Court to do so will be denied.

The Court now screens O'Keefe's habeas petition and, finding that the petition does not state a claim on which habeas corpus relief could be granted, the Court will dismiss this action.

O'Keefe's petition is styled as one brought under 28 U.S.C. § 2241. See Petition for Writ of Habeas Corpus (ECF No. 1-1). In the petition, O'Keefe, who is incarcerated pursuant to one or more state court judgments of conviction, challenges a 2004 burglary conviction in Nevada's Eighth Judicial District Court (Clark County). See *id.* at 3 (ECF No. 1-1, p. 2). However, 28 U.S.C. § 2254 is the "exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment § 2254 is properly seen as a limitation on the general grant of habeas authority in § 2241 that is triggered by a state prisoner who is in custody pursuant to a state court judgment." *White v.*

1 *Lambert*, 370 F.3d 1002, 1010 (9th Cir. 2004), overruled on other grounds by *Hayward*
2 *v. Marshall*, 603 F.3d 546 (9th Cir. 2010). Because O’Keefe’s petition reveals that he is
3 in custody pursuant to a state court judgment, § 2254—as opposed to § 2241—is the
4 exclusive vehicle for his habeas petition. *Id.* The Court will dismiss this action on this
5 ground.

6 Viewed as a petition under § 2254, O’Keefe’s petition would present several
7 issues that cannot properly be analyzed based upon his current petition, largely
8 because his current petition is not on the form required by this Court for a petition for
9 writ of habeas corpus under § 2254. For example, it is unclear whether O’Keefe would
10 be considered “in custody” on his 2004 burglary conviction, as would be required for a
11 petition under § 2254. Also, it appears that the one-year limitations period applicable to
12 a § 2254 petition under the 1996 Anti–Terrorism and Effective Death Penalty Act
13 (“AEDPA”) (see 28 U.S.C. § 2254(d)) expired long ago, and O’Keefe does not allege
14 any colorable basis to overcome that procedural bar; O’Keefe asserts in a generic
15 manner that he is actually innocent, but does not allege that he has discovered the kind
16 of new evidence of actual innocence required to overcome an AEDPA statute of
17 limitations bar. See *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (“To be credible, [an
18 actual innocence] claim requires petitioner to support his allegations of constitutional
19 error with new reliable evidence—whether it be exculpatory scientific evidence,
20 trustworthy eyewitness accounts, or critical physical evidence—that was not presented
21 at trial.”). Therefore, the Court will not treat O’Keefe’s current petition as one under
22 § 2254, but, rather, will dismiss this action without prejudice to O’Keefe initiating a new
23 habeas action under § 2254, using the correct form to do so.

24 O’Keefe has filed a motion requesting that, “as [an] alternative” the Court should
25 consider converting this action to one under 42 U.S.C. § 1983. See Motion (ECF No. 3).
26 The Court will deny that motion. As this action was initiated as a habeas action, with the
27 petition on a form meant for a habeas action under 28 U.S.C. § 2241, the Court is
28 without adequate information to screen and further adjudicate this as a § 1983 action.

1 Furthermore, it is well-established that a prisoner in state custody cannot use a § 1983
2 action to challenge his confinement; the prisoner's sole federal remedy, with respect to
3 the legal basis for his confinement, is a petition for a writ of habeas corpus. *Preiser v.*
4 *Rodriguez*, 411 U.S. 475, 489, 500 (1973). Where, in a § 1983 action, a state prisoner
5 alleges constitutional violations which would necessarily imply the invalidity of his
6 conviction or sentence, such claims are not cognizable under § 1983 unless the
7 conviction or sentence has been invalidated on appeal, by habeas petition, or through
8 some similar proceeding. *See Heck v. Humphrey*, 512 U.S. 477, 483–84 (1994) (§ 1983
9 claim not cognizable because allegations were akin to claim of malicious prosecution,
10 which includes as an element a finding that the criminal proceeding was concluded in
11 plaintiff's favor). O'Keefe makes no allegation that his burglary conviction has been
12 invalidated in any previous proceeding. The Court will, therefore, deny the motion to
13 convert this to a § 1983 action.

14 O'Keefe has filed two motions for appointment of counsel (ECF Nos. 5, 9).
15 "Indigent state prisoners applying for habeas corpus relief are not entitled to appointed
16 counsel unless the circumstances of a particular case indicate that appointed counsel is
17 necessary to prevent due process violations." *Chaney v. Lewis*, 801 F.2d 1191, 1196
18 (9th Cir. 1986) (citing *Kreiling v. Field*, 431 F.2d 638, 640 (9th Cir. 1970) (per curiam)).
19 The court may, however, appoint counsel at any stage of the proceedings "if the
20 interests of justice so require." *See* 18 U.S.C. § 3006A; *see also* Rule 8(c), Rules
21 Governing § 2254 Cases; *Chaney*, 801 F.2d at 1196. The Court determines that
22 appointment of counsel is unwarranted in this case. O'Keefe's motions for appointment
23 of counsel will be denied.

24 **IT IS THEREFORE ORDERED** that the Clerk of the Court is directed to
25 separately file the Petition for Writ of Habeas Corpus (ECF No. 1-1).

26 **IT IS FURTHER ORDERED** that Petitioner's motion to take judicial notice (ECF
27 No. 8) is **DENIED**.
28

1 **IT IS FURTHER ORDERED** that Petitioner's motion to convert this action to one
2 under 42 U.S.C. § 1983 (ECF No. 3) is **DENIED**.

3 **IT IS FURTHER ORDERED** that Petitioner's motions for appointment of counsel
4 (ECF Nos. 5, 9) are **DENIED**.

5 **IT IS FURTHER ORDERED** that this action is dismissed.

6 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter
7 judgment accordingly and close this case.

8 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to send a copy
9 of this order to the Attorney General of the State of Nevada.

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11 DATED THIS 10th day of August, 2022.

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15 LARRY R. HICKS
16 UNITED STATES DISTRICT JUDGE
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